STATE OF MICHIGAN
IN THE SUPREME COURT

TERIDEE LLC, a Michigan limited liability company; THE JOHN F. KOETJE TRUST, u/a/d 5/14/1987, as amended; and THE DELIA KOETJE TRUST, u/a/d 5/13/1987, as amended,

Plaintiffs/Appellees,

v

CLAM LAKE TOWNSHIP, a Michigan municipal corporation; and HARING CHARTER TOWNSHIP, a Michigan municipal corporation,

Defendants/Appellants.

Supreme Court Docket No. 153008

Court of Appeals Docket No. 324022

Wexford County Circuit Court Case No. 13-24803-CH

HON. William M. Fagerman

PLAINTIFFS/APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS/ APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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[There is another appeal between some of these same parties, arising out of the same transaction, which is now pending before this Court in Supreme Court Docket No. 151800]

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

COUNTER-STATEMENT OF BASIS OF JURISDICTION

Appellants' Application arises from the Court of Appeal's December 8, 2015, Opinion on Appeal affirming the circuit court's September 19, 2014, Opinion and Order.

Applications for leave to appeal to the Supreme Court are required, under MCR 7.302(B) and the circumstances presented here, to show either that (1) the issue preserved for appeal involves legal principles of major significance to the State's jurisprudence; (2) the issue preserved for appeal has significant public interest; or (3) the decision of the Court of Appeals is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

Appellants cannot demonstrate any of these requisite grounds. Therefore, the Application should be denied.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Did the circuit court and the Court of Appeals correctly hold that Appellants' Act 425 Agreement unlawfully contracted away Haring Township's legislative authority?

The Court of Appeals answered:	Yes.
The circuit court answered:	Yes.
Appellees answer:	Yes.
Appellants would answer:	No.

2. Did the circuit court and the Court of Appeals correctly hold that Act 425 does not permit a township to contract away its legislative authority?

The Court of Appeals answered:	Yes.
The circuit court answered:	Yes.
Appellees answer:	Yes.
Appellants would answer:	No.

3. Did the circuit court and the Court of Appeals correctly hold that the Townships could not sever and remove the illegal portions of their Act 425 Agreement because the offending provisions were central to the parties' agreement and interdependent with the remainder of the agreement?

The Court of Appeals answered:	Yes.
The circuit court answered:	Yes.
Appellees answer:	Yes.
Appellants would answer:	No.

I. INTRODUCTION

For more than six years, Appellees, TeriDee LLC; the John F. Koetje Trust, u/a/d 5/14/1987, as amended; and the Delia Koetje Trust, u/a/d 5/13/1987, as amended (collectively "TeriDee"), have been trying to develop their property at the interchange of M-55 and US-131. As the Court of Appeals noted in its December 8, 2015, Opinion, TeriDee seeks to develop its property into a mixed-use development that would include retail stores, a hotel, a restaurant, and other commercial entities.[1] Appellants, Clam Lake Township and Haring Charter Township (collectively "the Townships"), vigorously oppose any such development "in their backyard" and have attempted to block it at every turn, including by entering into two separate sham Act 425 agreements in an effort to prevent the property from being annexed to the City of Cadillac so that it could be developed.

With respect to their second Act 425 Agreement, the subject of this Application, the two Townships hired a shared attorney and quickly put together the sham agreement when they learned that TeriDee intended to renew its efforts to annex its property into the neighboring city of Cadillac. As mentioned above, this was a familiar scheme for the Townships, as they previously attempted to block TeriDee's annexation attempt with an illusory Act 425 Agreement. The Townships' first Act 425 Agreement was rejected by the State Boundary Commission ("SBC"), which unanimously concluded that it was not created to promote economic development but rather as an attempt to block annexation.

Despite the Townships' persistent claims to the contrary, it is obvious that their second Act 425 Agreement was not the "fruition" of a "thoroughly-evaluated plan." It was quickly thrown together in less than a month in a panicked reaction to news of TeriDee's new annexation

[1] See Court of Appeals' 12/8/15 Opinion, **Ex. A**, at 1.

petition. The reason for the Townships' haste is evidenced in e-mails, which indicate the belief that the Townships needed to get the agreement in place "BEFORE" TeriDee's annexation petition was filed.[2] Indeed, because the Townships' sole motivation was to block the annexation, they never even attempted to communicate with TeriDee, the only potential developer, before they entered into their "development" agreement. However, in their rush to put together a new and improved agreement that would both block the annexation and "fix" the problems with their first sham agreement, the Townships were too clever by half. The Townships drafted an illegal contract.[3]

It is well-settled law that a township board cannot lawfully contract away its legislative power or bind future township boards in the exercise of that power. Yet the Act 425 Agreement does exactly that, as it (1) requires that Haring Township rezone the property to a PUD district that complies with the various requirements set forth in the agreement, (2) precludes Haring Township from even considering a PUD rezoning application for the Transferred Area that does not comply with the zoning requirements of the Act 425 Agreement, and (3) requires that Haring Township rezone those portions of the property that were already developed for residential housing to a specified Haring Township zoning district, in addition to the other illegal provisions that are discussed in further detail below.

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[2] See 4/15/13 e-mail between Giftos and Rosser, **Ex B**.

[3] In addition, the SBC again determined that the second Act 425 Agreement was a sham contract that the Townships entered into in an attempt to prevent the annexation of TeriDee's property. That decision was affirmed by the circuit court on appeal, and the Townships' application for leave to appeal to the Court of Appeals was denied. The Townships have a separate Application on file with this Court (Docket No. 151800) on that issue. Thus, because their second Act 425 Agreement has been invalidated on two separate grounds, in two separate proceedings by two separate tribunals, the Townships must prevail on both of their Applications to this Court, as a loss on either one would render the other moot.

Leave to appeal should be denied in this case because the questions presented in the Townships' Application do not involve novel issues or unsettled areas of the law. Rather, the Townships simply seek a third audience for their same tired arguments. The Townships disagree with how TeriDee, the circuit court, and the Court of Appeals read the unambiguous language of the Act 425 Agreement. This unambiguous language makes clear that the contract unlawfully divests Haring Township of its legislative authority, rendering the agreement void. The Townships have urged the circuit court, the Court of Appeals, and now this Court to interpret that document differently, largely based on irrelevant and improper extrinsic evidence and sham amendments that the Townships manufactured during the course of the proceedings below. Indeed, once the Townships became aware, by virtue of TeriDee's Complaint and the circuit court's ruling on the parties' first round of motions, that their Act 425 Agreement contained illegal provisions, they took immediate action in an attempt to create new defenses. This included executing multiple amendments to their Act 425 Agreement while the lawsuit was ongoing and passing identical resolutions expressing their "wish to clarify" their interpretation of the Act 425 Agreement. None of these efforts proved successful.

Thus, at its core, the Townships' Application presents nothing more than an issue of contractual interpretation, which falls far short of the criteria for an application to this Court. The Townships have also added the routine issue of statutory interpretation to their list of issues on appeal. The issue is routine because it is the familiar strategy of a desperate appellant: an attempt to read language into a statute that does not exist. The circuit court and the Court of Appeals properly refused the Townships' invitation to read more into a statute than the plain language provides, and there is no basis for this Court to review, much less disturb, those rulings.

II. PROCEDURAL BACKGROUND

TeriDee filed a two-count Complaint for declaratory relief against the Townships. In Count I of its Complaint, TeriDee sought a declaration from the court that the Townships' Act 425 Agreement was invalid because it was a sham agreement that the Townships entered into solely to prevent the annexation of TeriDee's property. In Count II TeriDee requested a declaration that the Act 425 Agreement was invalid and void because it unlawfully contracted away Haring Township's legislative zoning authority. The parties engaged in motion practice at the outset of the case on both of these counts after the Townships responded to TeriDee's Complaint with a motion to dismiss.

In its December 20, 2013, Opinion and Order, the circuit court dismissed Count I of TeriDee's Complaint pursuant to the doctrine of primary jurisdiction. This ruling was based on the fact that the SBC was simultaneously considering the validity of the Act 425 Agreement in a separate proceeding. As the Townships correctly note in their Application, the SBC ultimately invalidated the Act 425 Agreement, finding that it was not enacted to promote economic development. Final Decision and Order, **Ex C**. The SBC's decision was affirmed by the circuit court on appeal. The Court of Appeals denied the Townships' Application for Leave to Appeal (COA Dkt No 325350), and the Townships' Application for Leave to this Court from those separate proceedings is currently pending (Supreme Court Docket No. 151800).

With respect to Count II of TeriDee's Complaint, the court rejected all of the Townships' arguments with two limited exceptions. The court held that discovery was necessary to evaluate the issues of whether (1) the Townships should be allowed to sever and remove the illegal portions of their Act 425 Agreement and whether (2) the Townships were carrying out or applying their agreement in a way that did not impermissibly bind Haring Township. Following discovery, the parties filed a second round of briefing. In its September 19, 2014, Opinion and

Order, the circuit court granted summary disposition in favor of TeriDee. The Court of Appeals affirmed the circuit court's opinion in its December 8, 2015, opinion. See Ex. A.

III. COUNTER-STATEMENT OF FACTS

A. TERIDEE SEEKS TO DEVELOP ITS VACANT LAND, WHICH IS LOCATED IN CLAM LAKE TOWNSHIP.

TeriDee is the owner of approximately 140 acres of vacant land (the "Property") located in Clam Lake Township. The Property is located near the intersection of State Highway M-55 and US-131. See Compl ¶ 13. TeriDee intend to develop the Property into a mixed-use development that would include retail stores, a hotel, a restaurant, and other commercial entities. *Id*. ¶ 14. It has been estimated that this project would create between 850 and 1,000 jobs. The proposed investment for the developed Property has been estimated to be at least $40,000,000. *Id*.

On June 3, 2011, TeriDee filed an application with the SBC that would have allowed the Property, along with other property, to be annexed into the City of Cadillac. *Id*. ¶ 15. TeriDee sought annexation of the Property into the City of Cadillac in order to gain access to the city's water and sewer services, as the proposed development cannot occur without connection to these public services. *Id*. ¶ 16. The City of Cadillac has water and sanitary sewer services within one-quarter mile from the proposed annexation area, and the City of Cadillac is able to provide the necessary public services as soon as they are required. In contrast, Clam Lake does not have the infrastructure or facilities to provide TeriDee with the necessary utilities for its planned development. *Id*. ¶ 17.

B. THE TOWNSHIPS OPPOSE TERIDEE'S PROPOSED DEVELOPMENT AND ENTERED INTO A SHAM ACT 425 AGREEMENT IN 2011 IN AN ATTEMPT TO STIFLE THAT DEVELOPMENT.

It is no secret that the Townships opposed TeriDee's 2011 annexation petition. Indeed, based on responses to requests made pursuant to the Michigan Freedom of Information Act, examination of township board minutes, and other documents, it cannot reasonably be disputed that the Townships entered into the first Act 425 agreement solely as a means to prevent that annexation from occurring. *Id*. ¶ 20.

On June 3, 2011, TeriDee filed its first application with the SBC that would have allowed its property, along with other property, to be annexed into the City of Cadillac. After TeriDee filed its 2011 annexation petition, the Townships hurriedly compiled an Act 425 agreement that contemplated some unspecific, future development for the same land.

The two township boards met on Thursday evening, September 15, 2011, to discuss the agreement and voted to go forward with the necessary public hearing (which they held as a joint township board activity) only four days later, on Monday, September 19, 2011. Notice of the meeting was posted just 18 hours in advance—on a Sunday—and the proposed Act 425 agreement was not otherwise publicized prior to the meeting. After holding the perfunctory public hearing on the 19th, the boards closed the hearing and voted to approve the agreement. *Id.* ¶ 21. The reason for this haste is evidenced in e-mails that indicate the belief that the agreement had to be signed and filed before the anticipated October 20, 2011, SBC meeting, at which time the Townships thought the SBC would address TeriDee's annexation petition. See e-mails, **Ex D**.

As if the timing of the agreement was not evidence enough, the communication between the Townships also makes clear that the sole purpose of the Act 425 agreement was to block TeriDee's 2011 annexation petition. For example, on September 14, 2011, Dale Rosser (Clam

Lake Township supervisor) told George Giftos (a member of the Haring Township Planning Commission) that "we have very tight timelines to meet to use this approach to avoid the possibility of the Boundary Commission making the decision on the development project." *Id.* (emphasis added). Rosser further stated that "[w]e are trying to beat a review of the annexation application before the Boundary Commission on October 20." *Id.* Likewise, on September 15, 2011, Giftos stated in an e-mail that "[t]his 425 annexation should put a halt to the State Boundary Commission's hearing on the annexation of the TerriDee[sic]/Koetje property to the City of Cadillac." *Id.* Reading the e-mail traffic between the Clam Lake Township supervisor and the leaders of the opposition in Woodland Estates and Pointe East leads to the inescapable conclusion that the Act 425 agreement was conceived and adopted for no other reason than to prevent the annexation. See *id.*

C. THE SBC DETERMINED THAT THE TOWNSHIPS' FIRST ACT 42 AGREEMENT WAS CREATED SOLELY AS AN ATTEMPT TO PREVENT THE DEVELOPMENT OF TERIDEE'S PROPERTY, NOT TO PROMOTE ECONOMIC DEVELOPMENT.

The Townships' attempted misuse of Act 425 did not escape the attention of the SBC. The Townships' sham agreement was rejected by the SBC without dissent and with a member of the SBC characterizing the agreement as "bovine scatology." The SBC specifically concluded that the Townships' first Act 425 agreement was invalid because it "was created solely as a means to bar the annexation and not as a means of promoting economic development." 8/8/12 SBC Summary of Proceedings, Findings of Fact, and Conclusions of Law at 1 (emphasis added), **Ex E**. This determination was based on the following facts regarding the Townships' first Act 425 agreement:

a. No clearly defined economic development project is named.

b. Clam Lake Township received no benefit from the agreement, i.e., there is no revenue sharing included.

c. Copies of e-mails obtained by the petitioner through a Freedom of Information Act Request and provided to the Commission between Clam Lake Township and the Charter Township of Haring discussed the 425 agreement as a means to deny the Commission jurisdiction over the proposed annexation.

d. Concern over the Charter Township of Haring's ability to effectively and economically provide the defined public services. No cost study was proven to analyze the differential connecting the area to public services from the Charter Township of Haring versus connecting to services from the city of Cadillac.

e. The timing of the 425 agreement. The agreement was executed more than three months after the annexation request was filed.

Id. at 3. Thus, the SBC specifically concluded that the Townships' first Act 425 agreement was "invalid" because "it was not being used to promote economic development." *Id.* at 2.

Notwithstanding that the Townships' Act 425 agreement was rejected, TeriDee's 2011 annexation petition was ultimately denied pursuant to an October 3, 2012, final decision and order by the Department of Licensing and Regulatory Affairs ("LARA"). With TeriDee's proposed development at least temporarily on hold, the Townships did not even bother to keep up the charade that they were interested in any development of TeriDee's property. Indeed, the Townships did not bother to prepare a new Act 425 agreement until the eve of the filing of TeriDee's renewed annexation petition.

D. WITHOUT CONSULTING WITH TERIDEE AND OVER TERIDEE'S OBJECTIONS, THE TOWNSHIPS FILED A SECOND ACT 425 AGREEMENT AFTER TERIDEE FILED ITS PENDING ANNEXATION PETITION.

The SBC rules allow for the filing of a new annexation petition no earlier than two years after the previous petition was filed. MCL 123.1012(3). Pursuant to this rule, TeriDee filed its new annexation petition on June 5, 2013. When the Townships, which continued to oppose TeriDee's proposed development, became aware of TeriDee's intention to file a new petition, they immediately resorted to a familiar scheme: entering into a sham Act 425 agreement.

On May 8, 2013, at a special joint meeting held at the Clam Lake Township Hall, the Townships each adopted a resolution approving an agreement for the conditional transfer of certain property, which included TeriDee's Property (the "Transferred Area"), from Clam Lake Township to Haring Township pursuant to Act 425. Compl ¶ 39. The Townships filed their Act 425 Agreement with the Wexford County clerk and the secretary of state on June 10, 2013, after TeriDee's currently pending annexation petition was filed, and without first consulting with TeriDee. *Id.* ¶ 40. Once again, the only significantly sized vacant property (nearly 140 acres) within the Transferred Area is owned by TeriDee. *Id.* ¶ 45. The remainder of the Transferred Area is used for road purposes, owned by MDOT, or already substantially developed for residential purposes without utilization of publically owned water or sewer services. *Id.* ¶ 23.

Thus, the Townships, who were aware of TeriDee's intent to file the new annexation petition and who continue to oppose the annexation, resorted to their now-familiar scheme of entering into a sham Act 425 agreement just as the two-year waiting period was coming to a close. While the Townships unsuccessfully attempted to correct some of the defects from their first sham agreement, it is obvious from the four corners of the document that it was once again drafted with a sole purpose: to deprive the SBC of jurisdiction to consider TeriDee's annexation petition.

E. DISCOVERY IN THE CASE BELOW MADE CLEAR THAT THE TOWNSHIPS ENTERED INTO THE ACT 425 AGREEMENT TO PREVENT THE ANNEXATION AND DEVELOPMENT OF THE PROPERTY.

The Townships have devoted significant time and effort in describing the supposed genesis of the Act 425 Agreement. This is no doubt motivated in large part by their realization that they face an uphill battle convincing anyone that their new Act 425 Agreement, which they executed less than ten months after their first Act 425 agreement was characterized as "bovine

scatology" and rejected without dissent by the SBC, is based this time around on pure motives and a genuine change of heart regarding the development of the Transferred Area.

According to the Townships in their pleadings in the case below and their filings with the SBC, the Act 425 Agreement "represents the fruition of a long-established, thoroughly-evaluated plan."[4] Indeed, the Townships would have this Court believe that the Act 425 Agreement was the result of deliberation and discussions that date back to 1999 regarding the Townships' plans for sharing utility services. The Townships further maintain that they each independently decided that May 8, 2013, was an "ideal time" to hold a special meeting to enter into the Act 425 Agreement which, as they claim, is "the culmination of long-established plans to extend Haring utility services to Clam Lake."[5] Respectfully, their story does not add up. The SBC rejected this false narrative, and this Court should do the same.

The Townships' board members provided candid testimony about the origin of the Act 425 Agreement. This testimony, including from Delores Peterson, the clerk for Clam Lake, is completely at odds with the statements the Townships made in their pleadings:

> Q. Why did Clam Lake enter into this agreement with Haring Township?
> A. So that we could have this property go into Haring Township instead of the city, to be developed by Haring and not the city.
> Q. There was concern that if the city developed the property via an annexation that it would be developed in a way that was inconsistent with how Clam Lake wanted the property to be developed. Correct?
> A. Correct.
> Q. And that's why this agreement-- that's why Clam Lake put-- negotiated with Haring to put the zoning, the PUD zoning, requirements in the agreement. Correct?
> A. Yes.
> Q. So that Clam Lake would have assurances that the property, once transferred to Haring, would be developed consistent with the agreement. Correct?

[4] See Defs' 7-Day Rebuttal Submission at 7, **Ex F**.

[5] See *id*. at 5.

A. Yes, I would say so.

* * *

* * *

Q. That's the benefit that Clam Lake gets out of this agreement, the property has been transferred and is subject to minimum zoning requirements. Correct?
A. Yes.
Q. What other benefits does Clam Lake get out of this agreement?
A. Well, the agreement lasts for twenty years I am thinking and after the 20-year period is up then the land can be reverted back to Clam Lake Township.
Q. Anything else, any other benefits to Clam Lake under this agreement, that you are aware of?
A. I don't have an answer.
Q. You are not aware of any others--
A. No.

Peterson Dep Tr 5:17–6:12, 6:16–18, 8:5–9, 10:10–23, 11:3–6, Appellants' Appeal Br Ex 21 (emphasis added). Similarly, Dale Rosser, the Clam Lake supervisor, testified that the zoning regulations were drafted to protect the neighboring residential property owners from the type of "big box, mid box, hotel, restaurant, gas station" development that TeriDee proposed. Rosser Dep Tr 38:13–39:1, Appellants' COA Brief at Ex. 22. This testimony was echoed by Clam Lake board member Larry Payne, who also explained why the agreement was enacted:

Q. As we sit here today, what benefits is Clam Lake receiving under the Act 425 Agreement?
A. The good feeling that Haring will make the right decisions in terms of their zoning regulations.
Q. What else?
A. That's pretty much it.

* * *

Q. Clam Lake didn't enter into that agreement for the purpose of getting water and sewer services to Clam Lake from Haring. Correct?
A. 425's intent was to have Haring take over that property for 20 years and to establish the zoning regulations for that property or those areas.

Payne Dep Tr 19:19–24, 22:10–18, Appellants' COA Brief at Ex. 20 (emphasis added). Thus, from Clam Lake's perspective, the purpose of the Act 425 Agreement was to transfer the property to Haring Township to prevent annexation and restrict development.

In addition, the e-mails that the Townships produced in discovery also paint a very different picture about the origin of the Act 425 Agreement from what has been represented to the Court. There is not a single e-mail (or any other communication) between the Townships that discusses or proposes entering into an Act 425 agreement for the purpose of sharing utilities. Instead, the only time an Act 425 agreement is ever mentioned is solely in connection with preventing annexation and development.

Specifically, an April 15, 2013, e-mail exchange between, among others, George Giftos (vice-chairman of the Haring Planning Commission) and Dale Rosser (the Clam Lake supervisor), reveals the Townships' true motivation in entering into the Act 425 Agreement. That e-mail exchange, entitled "here we go again," makes clear that the parties had learned within "the last few days" that TeriDee was preparing to file an annexation petition:

> The rumor is that Teri-Dee will re-file for annexation to the City on June 4. How can that happen, you ask? I thought we had 2 years before they could file again. Well, we did, but it's 2 years from the original date of their filing and that was June 4, 2 years ago! If they fast-track the project and the State Boundary Commission approves, Teri-Dee could conceivably be all set to go by the end of summer.
>
> Now, what are our options? As I see it, the reason that the 425 agreement with Haring TWP was thrown out by the State Boundary Commission was that it was deemed to be a ploy and had been filed AFTER the filing by Teri-Dee for annexation. If we were to pursue this again and got it done BEFORE June 4, that argument would no longer apply.

See e-mail exchange (Ex B)(emphasis added).

Thus, in response to a rumor that TeriDee was planning to file an annexation petition, there is an immediate e-mail exchange (among the same individuals who previously supported the effort to prevent TeriDee's annexation petition by filing a sham Act 425 agreement) that specifically mentions using an Act 425 agreement as a strategy to prevent annexation. The e-mail further suggests that, this time around, the Townships should enact the agreement

"BEFORE" the annexation petition is filed in order to convince the commission that the Townships are not engaged in a "ploy." Less than a month later, the agreement was both introduced and approved at a joint special meeting of the Township boards.

Other e-mails produced by the Townships make clear that the Townships and their supporters did not suddenly change their minds about the development of the Property. They continue to vigorously oppose any commercial development of the Property, and the e-mails express optimism that the stringent zoning requirements in the Act 425 Agreement will stifle any proposed development and send it somewhere else. On May 4, 2013, four days before the Townships entered into the Act 425 Agreement, George Giftos wrote to the Townships' supervisors, Dale Rosser and Bob Scarbrough, to express his optimism that the restrictive PUD requirements in the agreement would drive away any potential development. See 5/4/13 Giftos communication, **Ex. G** (emphasis added).

The e-mails produced by the Townships and the deposition testimony of their board members demonstrate that the zoning requirements, which the Townships are trying to sever from their agreement in order to save it, are the central provision and heart of the contract. Discovery in this case does not support the Townships' repeated statements to the circuit court that they entered into the Act 425 Agreement for the purpose of sharing utilities.

F. DISCOVERY ALSO CONFIRMED THAT HARING TOWNSHIP IS NOT REQUIRED TO EXTEND UTILITIES TO CLAM LAKE UNDER THE ACT 425 AGREEMENT.

The Townships argued below that they should be able to sever the illegal zoning restrictions and requirements from the agreement because those provisions are secondary to the provisions that discuss water and sewer utilities. However, as the board members admitted in their deposition testimony, there is no requirement in the Act 425 Agreement that Haring Township provide any utilities to any property in Clam Lake. Mackey Dep Tr 21:1–3,

Appellants' COA Brief at Ex. 23; McCain Dep Tr 13:5–15, Appellants' COA Brief at Ex. 29; Kitler Dep Tr 25:12–17, Appellants' COA Brief at Ex. 24; Soule Dep Tr 20:14–16, Appellants' COA Brief at Ex. 30; Baldwin Dep Tr 18:24–19:1, Appellants' COA Brief at Ex. 27.

Instead, as the board members concede, the most the agreement requires is that the Townships "mutually cooperate" in "exploring the extension of Haring public wastewater services to other areas of Clam Lake, subject to the availability of those services." See Act 425 Agreement at 5–6, Appellants' COA Brief at Ex. 1. This requirement to "mutually cooperate" and "explore" the potential extension of utilities imposes no obligation on Haring Township and provides no benefit to Clam Lake. Soule Dep Tr 19:18–23, Appellants' COA Brief at Ex. 30. Finally, Haring Township is not even required to "mutually cooperate" with Clam Lake unless and until water and sewer utilities are first extended to the Transferred Area. See Act 425 Agreement at 5–6, Appellants' COA Brief at Ex. 1.

However, the "requirement" to extend water or sewer utilities to the Transferred Area is no requirement at all. As a preliminary matter, discovery has confirmed that (1) there are no properties in the Transferred Area that currently need water or sewer utilities from Haring Township, and (2) none of the property owners in the Transferred Area have requested that Haring Township provide those services. Twps' Supp Response to 1st Interrogs and Req for Production, **Ex H**; Scarbrough Dep Tr 36:19–21, Appellants' COA Brief at Ex. 31; Soule Dep Tr 17:11–16, Appellants' COA Brief at Ex. 30; McCain Dep Tr 14:6–12, Appellants' COA Brief at Ex. 29; Baldwin Dep Tr 20:7–15, Appellants' COA Brief at Ex. 27; Wilkinson Dep Tr 23:10–18, Appellants' COA Brief at Ex. 25. Thus, as the board members testified, there will be no extension of Haring Township water or sewer services to the Transferred Area unless and until the property is first developed. Rosser Dep Tr 13:4–7, Appellants' COA Brief at Ex. 22; Soule

Dep Tr 18:21–23, Appellants' COA Brief at Ex. 30; Baldwin Dep Tr 20:16–18, Appellants' COA Brief at Ex. 27. This is confirmed by the language of the Act 425 Agreement, which provides that Haring Township is only required to extend water and sewer to the "newly-developed portion of the Transferred Area" and only under the conditions that Clam Lake pay for all of the costs to extend the utilities. See Act 425 Agreement at 4–5, Appellants' COA Brief at Ex. 1.

In addition, while the lawsuit was pending below, the Townships passed identical resolutions of intent that specifically provide that water and sewer utilities will not be provided to the Transferred Area unless the Townships enter into an agreement with TeriDee to develop the Property under which TeriDee agrees to cover all of the costs. See Development Resolutions, **Ex I**. However, as is set forth above, discovery in this case makes clear that the Townships drafted the restrictive PUD requirements in the agreement with the specific intent to discourage and prevent TeriDee from ever developing the Property. Thus, to the extent that there is any requirement under the agreement that Haring Township provide water or sewer to the Transferred Area, it is an illusory requirement under the Townships' control.[6]

In sum, the unambiguous language of the Act 425 Agreement makes clear that it is not a utilities sharing agreement, a fact that was confirmed by the board members' testimony. The agreement does not require that Haring Township provide any utilities, either to Haring Township or the Transferred Area, and discovery in this case confirms that it was certainly not enacted for those purposes.

[6] This is particularly true under the Townships' proffered "interpretation" of the agreement, under which Haring Township has no obligation to comply with the development requirements in the agreement and is free to zone the Transferred Area as it sees fit, including in a manner that prohibits any development. Twps' 10/23/13 Supp Br at 7–8. Under this reading of the contract, any obligation by Haring Township to provide utilities to the Transferred Area is completely illusory.

G. THE TOWNSHIPS TOOK SEVERAL STEPS TO MANUFACTURE DEFENSES TO TERIDEE'S CLAIM IN DIRECT RESPONSE TO THE CIRCUIT COURT'S DECEMBER 20, 2013, OPINION AND ORDER.

The Townships did not sit on their hands after the circuit court issued its December 20, 2013, Opinion and Order. Rather, they took immediate action to attempt to bolster their defenses in this case. The Townships' most direct and immediate response to the circuit court's first opinion was to amend their agreement to add a second severability provision to the Act 425 Agreement that specifically contemplated the possibility that the circuit court would hold that the zoning provisions in the agreement are illegal. See 2d Am to Act 425 Agreement, Appellants' COA Brief at Ex. 3. In the event of such a ruling, the new severability provision would replace 11 pages of the agreement—all of the detailed zoning and development requirements and regulations in Article 6—with the single requirement that Haring Township comply with MCL 125.3504(3). *Id*. The new severability provision would replace the heart of the agreement with nothing at all, as Haring Township is required to comply with MCL 125.3504(3)(and all other applicable laws) regardless of whether the Act 425 Agreement says so.

The Townships also passed identical resolutions following the circuit court's ruling in which the Townships express their "wish to clarify their original intent" of the Act 425 Agreement, such that the agreement should be interpreted "as giving Haring the independent legislative authority to determine the content of the zoning regulations that will apply to the Transferred Area." See Resolutions, Appellants' COA Brief at Ex. 32; 2/10/14 Haring Twp Bd Minutes, **Ex J**. These resolutions do not explain how this clarification of the Townships' "original intent" can overcome the express zoning requirements imposed on Haring Township in the agreement.

Finally, Clam Lake allowed Haring Township to make limited changes to its PUD zoning ordinance that are less restrictive than the zoning requirements in the Act 425 Agreement. The

Townships argue that the fact that they did not amend the agreement to reflect these changes demonstrates that Haring Township is not bound by the agreement's zoning restrictions and requirements. Any such argument is easily defeated by the plain language of the Act 425 Agreement, which specifically provides that the development regulations in the agreement override any inconsistent, less stringent regulations that Haring Township might enact:

> The PUD plan shall be reviewed in accordance with, and shall otherwise comply with, the PUD regulations of the Haring Township Zoning Ordinance, to the extent that those regulations are not inconsistent with the above minimum requirements. Where the above regulations are more stringent, the more stringent regulations shall apply.

See Act 425 Agreement at art 1 § 6(a)(V), p 17, Appellants' COA Brief at Ex. 1 (emphasis added). Thus, the fact that Haring Township was allowed to amend its PUD zoning ordinance is of no consequence, as it is still prohibited from considering a PUD application that does not comply with the more stringent requirements in the agreement.

It is also noteworthy that the first time Haring Township adopted a PUD zoning ordinance that deviated from the requirements and restrictions of the Act 425 Agreement, the Townships believed it was necessary to amend the agreement to incorporate those differences. See 1st Am to Act 425 Agreement, Appellants' Appeal Br Ex 2. However, after the circuit court issued its ruling, the Townships elected not to amend the agreement when Haring Township made subsequent changes to its PUD zoning ordinance. The board members could not explain why the agreement was amended in the first instance and not in the second. See, e.g., Wilkinson Dep Tr 37:1–3, Appellants' COA Brief at Ex. 25.

IV. LAW AND ARGUMENT

A. STANDARD OF REVIEW

In reviewing a trial court's decision on a motion for summary disposition, this Court applies a *de novo* standard of review. *Citizens Ins Co v Secura Ins*, 279 Mich App 629, 782; 755

NW2d 563 (2008). Issues of contract interpretation are questions of law that are also subject to a *de novo* standard of review. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

B. THE ACT 425 AGREEMENT UNLAWFULLY AND UNAMBIGUOUSLY CONTRACTS AWAY HARING TOWNSHIP'S LEGISLATIVE POWER.

1. It Is Unlawful for Township Boards to Contract Away or Otherwise Delegate Their Legislative Power.

The Townships do not contest the well-settled law that a township board cannot lawfully contract away its legislative power or bind future township boards in the exercise of that power. See, e.g., *City of Hazel Park v Potter*, 169 Mich App 714; 426 NW2d 789 (1988)(collecting cases). Likewise, the Townships cannot challenge the fact that it is well settled in Michigan that zoning and rezoning of property are legislative functions. See *id*. at 669; *Schwartz v City of Flint*, 426 Mich 295, 307–08; 395 NW2d 678 (1986). Instead, the Townships claim either that they are legislatively authorized to contract away their zoning powers in an Act 425 agreement or, alternatively, that their agreement does not do so. They are wrong on both counts.

2. The Act 425 Agreement Unlawfully and Unambiguously Contracts Away Haring Township's Legislative Power.

The unambiguous language of the Act 425 Agreement imposes each of the following obligations or requirements on Haring Township's current and future boards:

- The agreement requires Haring Township to rezone the property within the Transferred Area that is already developed for residential housing to a particular Haring Township zoning district:

> the . . . portions of the Transferred Area that are already developed for residential housing **shall be zoned** in a Haring zoning district that is comparable to the existing County zoning and existing land use . . . .

Act 425 Agreement at art 1 § 6(a)(1), p 8, Appellants' COA Brief at Ex. 1 (emphasis added). As the Court of Appeals held on appeal, this provision alone, which unquestionably constitutes an

unlawful delegation of Haring Township's zoning power to Clam Lake under the Act 425 Agreement, renders the parties' contract void:

> This clearly contracts away Haring's zoning power. It required Haring to rezone the residential portion of the transferred area to one of its comparable zoning districts and does not give Haring any discretion to leave the area zoned by the county or rezone it to a district it prefers.

See Ex. A at 5.

- The agreement further requires that Haring:

> adopt provisions in its zoning ordinance that allow mixed-use commercial/residential PUDs, and which require that such PUDs comply with the following minimum requirements . . . .

Id. at art 1 § 6(a)(2), p 8 (emphasis added). Thus, Haring Township has given Clam Lake the right under the Act 425 Agreement to require that Haring Township adopt certain particular PUD provisions in its zoning ordinance, regardless of whether the current or future Haring Township boards want such requirements in the township's zoning ordinance. Moreover, Clam Lake could use this language to prevent a future Haring Township board from removing the required PUD zoning from Haring Township's zoning ordinances. If the Act 425 Agreement had been upheld, Haring Township would have had no say in the matter for the next twenty years. The Court of Appeals also correctly held that this provision constitute an independent divestment of Haring's legislative authority. See Ex. A at 5.

- The agreement requires Haring Township to rezone the undeveloped portion of the Transferred Area to a planned unit development district that complies with the minimum requirements of the Act 425 Agreement upon application by a property owner that complies with the minimum requirements of the Act 425 Agreement:

> the balance of the Transferred Area that is currently undeveloped **shall be rezoned** upon application of the property owner(s) to a planned unit development ('PUD') district that permits mixed commercial/residential use . . . .

Id. (emphasis added). If, as an example, a future Haring Township board decided ten years after the enactment of the Act 425 Agreement to rezone the Transferred Area as residential, Clam Lake could subsequently require Haring Township to rezone the Transferred Area back to a PUD district that complies with the restrictions and requirements in the Act 425 Agreement if a property owner submits a qualifying application.

- Conversely, the agreement prohibits Haring Township from considering a PUD application to develop the Transferred Area that does not conform to the letter of the Act 425 Agreement:

> Haring **shall not consider** a PUD rezoning application for this portion of the Transferred Area until (i) it has adopted provisions in its zoning ordinance that allow mixed-use commercial/residential PUDs, and which require that such PUDs comply with the following minimum requirements and (ii) the property owner(s) have submitted an application that complies with the following minimum requirements.

Id. (emphasis added). Again, under this unambiguous language, the current Township board and any other boards for the next twenty years could not have even considered an application to rezone and develop the Transferred Area unless that application and proposed rezoning complied with all of the zoning restrictions and requirements set forth in the Act 425 Agreement, which the Court of Appeals correctly determined renders the agreement void. See Ex. A at 3.

- Finally, the agreement provides that the zoning requirements in the Act 425 Agreement expressly control and supersede any less stringent provisions in Haring Township's zoning ordinance with respect to any development of the Transferred Area:

> The PUD plan shall be reviewed in accordance with, and shall otherwise comply with, the PUD regulations of the Haring Township Zoning Ordinance, to the extent that those regulations are not inconsistent with the above minimum requirements. Where the above minimum requirements are more stringent, the more stringent regulations shall apply.

Id. at art 1 § 6, V, p 17 (emphasis added). As the Townships acknowledge in their Brief on Appeal, this requirement has already been incorporated into Haring Township's zoning ordinance. Appellants' COA Brief at 30. Thus, Haring Township would be required, if the Act

425 Agreement were in place, to keep this provision in its ordinance, which would in turn mandate that Haring Township apply the more stringent requirements set forth in the Act 425 Agreement over any less stringent requirements set forth in Haring Township's general PUD regulations. The Townships do not dispute this point. *Id*. The Court of Appeals held that this is a separate and independent unlawful restriction on Haring's zoning power:

> This provision is simply reiterating that Haring is to apply the minimum requirements in the agreement if they are more stringent than its general PUD regulations. Again, this is a restriction on Haring's zoning power.

See Ex. A at 4.

It is axiomatic under Michigan law that this Court must interpret the Act 425 Agreement as written, because "an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). The Townships' agreement, as written, unambiguously imposes zoning restrictions and requirements on Haring Township. Consistent with the holdings in *Potter* and *Inverness Mobile Home Community v Bedford Township*, 263 Mich App 241; 687 NW2d 869 (2004), the zoning requirements that are imposed on Haring Township's current and future boards constitute an unlawful delegation of Haring Township's legislative power. For this reason, the circuit court properly declared that the agreement is void.

3. The Circuit Court Properly Rejected the Townships' Argument that the General Language in Art 1, § 6 Overrides the Specific Zoning Requirements Set Forth in the Act 425 Agreement.

The Townships continue to argue that the language in Article 1, Section 6 of the Act 425 Agreement that states that the "Transferred Area shall be subject to Haring's Zoning Ordinance and building codes as then in effect or as subsequently amended" means that Haring Township is not actually bound by the specific zoning requirements set forth above. See Appellants' COA Brief at Ex. 1, p. 18, art 1 § 6(c). As a matter of common sense, if the Townships wanted to indicate that Haring Township was not bound by the specific zoning requirements in Article 1,

Section 6 of the agreement, they would have said so. The Townships were represented by the same counsel, who drafted the agreement and all of the subsequent amendments. The fact that the agreement remains silent on this specific issue, despite all of the Townships' amendments during the course of the lawsuit, speaks volumes. Because the Townships had every opportunity to include the specific language but did not do so, they cannot now be heard to offer up a strained interpretation of a much more general provision.

Moreover, there is no mystery with the respect to the meaning of this phrase. The Transferred Area will, of course, be subject to Haring Townships' ordinances and building codes as they currently exist or as amended, except that Clam Lake could always Haring Township to the zoning restrictions and regulations in Article 1, Section 6. Indeed, the Court of Appeals had no trouble determining the commonsense meaning of this provision ("[t]his merely provides that the transferred area will be under the jurisdiction of Haring and subject to its zoning ordinances for the duration of the transfer"). See Ex. A at 4. The Townships' alternate interpretation, that the phrase "or as subsequently amended" means that Haring Township could immediately undo or ignore the ten pages of specific zoning restrictions and requirements, is legally untenable. The Townships are actually asking that this Court interpret and construct their Act 425 Agreement such that Haring Township does have zoning obligations and requirements, but those obligations and requirements go away immediately and forever as soon as Haring Township rezones the Transferred Area. In other words, the Townships maintain that it is perfectly acceptable for Haring Township to undo the zoning requirements immediately after they are implemented.[7]

[7] Indeed, the Townships argued throughout the course of the lawsuit below that Haring Township can zone the Transferred Area as it sees fit, including zoning it as residential or agricultural. See, e.g., Twps' 10/23/13 Supp Br at 7–8. If the Court accepts the Townships' reading of the Act 425 Agreement (which it should not, as it is contrary to the unambiguous language of the agreement), Haring Township could prevent the Transferred Area from ever

The circuit court and the Court of Appeals properly rejected such an interpretation as it is both contrary to the unambiguous language of the Agreement and nonsensical.

The Townships' argument also runs afoul of the most basic rules of contractual interpretation. First, "contract[s] should be read as a whole and meaning should be given to all terms." *Royal Prop Group LLC v Prime Ins Syndicate Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005). Put another way, courts must give harmonious effect, if possible, "to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Knight Enters Inc v Fairlane Car Wash Inc*, 482 Mich 1006; 756 NW2d 88 (2008)(reversing lower court interpretation of agreement that did not give effect to both paragraphs at issue). Likewise, "specific [contract] provisions normally override general ones." *Holmes v Holmes*, 281 Mich App 575, 596; 760 NW2d 300 (2008); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 368, fn22; 817 NW2d 504 (2012)(holding that specific contract provisions control over related but more general provisions).

In applying these principles, the court in *Holmes* refused to apply a general modification provision to a contractual term that itself contained a specific modification limitation, because the more specific provision would have otherwise been rendered meaningless, and the more general provision would have controlled the specific. *Holmes*, 281 Mich App at 596. The same result is warranted here. If the Court were to interpret the Act 425 Agreement as the Townships propose, it would elevate a general provision over pages and pages of more specific

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being commercially developed by, for example, rezoning it as residential. And as the Townships acknowledge, if the Property is not developed, Haring Township will not be required to extend utilities to the Transferred Area. Thus, under the Townships' proffered reading, Haring Township has the complete discretion to determine whether it will ever perform its obligations, which is the textbook definition of an illusory contract. See, e.g., *Mastaw v Naiukow*, 105 Mich App 25; 306 NW2d 378 (1991); *Estate of Swartzenberg v Swartzenburg*, unpublished opinion per curiam of the Court of Appeals dated June 24, 1997 (Docket No 196677), at *4.

requirements, rendering the zoning requirements meaningless and writing them out of the agreement. Such a result is prohibited as a matter of law.

In addition, the Townships' argument and interpretation of subsection (c) of section 6 fails for an independent reason, as the Court of Appeals correctly noted in its decision. Even assuming, for purposes of argument, that the Townships' proffered interpretation of this provision was viable, which is most certainly is not, it still constitutes an unlawful delegation of Haring's legislative zoning authority. That is, even if, as the Townships urge, this provision should be read as allowing Haring to later "undo" all that the agreement requires, it still initially imposes unlawful requirements onto Haring Township:

> While Haring may later amend its zoning ordinance over the transferred area, initially, it is still required to adopt into its ordinance the minimum requirements provided in the agreement before it may consider and approve an application for development.

See Ex. A at 4.

4. Haring Township's Adoption of Slightly Less Restrictive PUD Regulations Highlights Why the Act 425 Agreement Is Illegal and Void.

As set forth above, the Townships were busy manufacturing defenses to TeriDee's claim during the pendency of the case below. The Townships appear particularly proud of their efforts in having Haring Township enact a PUD zoning ordinance that is slightly less restrictive in some respects than the zoning regulations contained in the Act 425 Agreement. However, the Townships' actions in that regard provide the Court with an excellent example of why the illegal agreement cannot stand.

As the Townships have described in their Brief on Appeal, Haring Township has been allowed to adopt PUD zoning regulations that are slightly different from, and in some cases less restrictive than, the PUD regulations set forth in the Act 425 Agreement. For example, Haring

Township was allowed to adopt an ordinance that allows for front building facades to have a lower percentage of glass than is required in the Act 425 Agreement and was allowed to remove certain screening requirements that are in the agreement for parking lots that face US-131. However, the fact that the current Clam Lake board did not press its rights under the contract and allowed Haring Township to enact an ordinance with these changes does not change the fact that a future Clam Lake board could enforce the agreement and future Haring Township boards would be so bound.

For example, if a developer provides an application to develop the Transferred Area that satisfies the less stringent requirements in Haring Township's existing zoning ordinance, but does not meet the requirements of the Act 425 Agreement, there is no question that Clam Lake could prevent such a development by enforcing the specific language in the agreement that specifically prohibits Haring Township from considering such a development request:

> Haring shall not consider a PUD rezoning application for [the undeveloped portion] of the Transferred Area until (i) it has adopted provisions in its zoning ordinance that allow mixed-use commercial/residential PUDs and which require that such PUDs comply with the following minimum requirements, and (ii) the property owner(s) have submitted an application that complies with the following minimum requirements . . . .

Act 425 Agreement at 8, art I § 6(a)(2), Appellants' COA Brief at Ex. 1 (emphasis added). In addition, if a developer submitted a development proposal that met the requirements of the Act 425 Agreement, but was different than those contained in Haring Township's zoning ordinance, the agreement requires that Haring Township amend its zoning ordinance to match the application and comply with the agreement. *Id.*

Likewise, Clam Lake could also prevent such a development by enforcing the requirement in the Act 425 Agreement that "the more stringent regulations [in the Act 425 Agreement] shall apply" in place of any PUD regulations in Haring Township's zoning

ordinance. *Id.* at 17, art I § 6, V. Thus, if the Act 425 Agreement is allowed to remain in force, Clam Lake could use the agreement to prevent future Haring Township boards from developing the property pursuant to Haring Township's duly enacted ordinances. This is the very essence of an unlawful delegation of legislative zoning authority and renders the agreement illegal and invalid as a matter of law.

5. The Townships' Argument that They Are Only Required to Rezone the Transferred Area Upon Receipt of a Qualifying Application Does Not Save Their Illegal Contract.

The Townships also argued below that the language in the Act 425 Agreement does not constitute an unlawful delegation of legislative power because Haring Township is only required to rezone the Transferred Area upon receipt of a qualifying application from the property owner(s). This argument is defeated by the holding in *Inverness*, which is directly on point.

Inverness involved a challenge to the enforceability of a consent judgment entered into between the plaintiff developer and the defendant township. Pursuant to the terms of the consent judgment, which resolved prior litigation between the parties, the plaintiff had five years to locate and identify a qualifying parcel of property in the township on which to develop a new manufactured home community development. *Inverness*, 263 Mich App at 243–44. Once the plaintiff identified such a parcel, and absent any objection by the township, the township was required to amend its master plan to permit a manufactured housing development and was bound to agree that such a use was reasonable. *Id*. at 245. In sum, the consent judgment required the future township board to a master plan and ultimately rezone a parcel of property—if a parcel was located and optioned within five years from the date of the agreement. Thus, just as in this case, it was possible in *Inverness* that a qualifying parcel would never be identified, such that the township would not ever be required to amend its master plan. This fact did not prevent the

Court of Appeals from holding that the requirement in the consent judgment mandating a future amendment of the master plan in the event property was identified rendered the agreement void:

> The language regarding future use that limits future boards from making determinations about what is reasonable deprives future boards of discretion which public policy demands should be left unimpaired.
>
> * * *
>
> We conclude that paragraphs 10 through 13 of the consent judgment are void because the limitations on the amendment of the master plan constitute an improper infringement of the legislative authority of a future township board.

Id. at 249–50 (emphasis added)(internal citations and quotations omitted).

This Court of Appeal's decision in *Potter*, *supra*, is also instructive. In that case, the Court held that an employment contract impermissibly deprived a future city council of its legislative authority, even where the contract allowed the future council to terminate the employee. *Potter*, 169 Mich App at 722–23. Thus, in both *Inverness* and *Potter*, the Court elevated substance over form in voiding the agreements at issue, even where the municipalities arguably had an option or scenario under which they would not have to relinquish their discretion.

The same result is warranted in this case. There is no dispute that the rezoning of the Transferred Area is a legislative power, and the language of the Act 425 Agreement requires the current and future Haring Township boards to rezone the Transferred Area upon receipt of a qualified development application from the owners. The Townships' argument that such an application might never be provided is defeated by the Court's holdings in *Inverness* and *Potter*. The crucial consideration is that a current or future township board will be bound to rezone the property in a particular manner if it receives a qualifying application, ensuring that the requested rezoning will pass. This requirement that legislatively binds current and future Haring Township boards to rezone the Transferred Area constitutes an improper infringement of legislative authority and renders the agreement void.

The Townships also argue that the language in the Act 425 Agreement that references the ability of Haring Township's future boards to amend the zoning of the Transferred Area also demonstrates that future boards are not required to rezone the Transferred Area. However, there is no language in the agreement that would allow for an amendment that did not meet the minimum development requirements as set forth in the agreement. More importantly, the Transferred Area must be zoned or rezoned consistent with the requirements of the agreement upon receipt of a qualified application, regardless of whether there were prior amendments to that zoning.

The Act 425 Agreement unambiguously requires Haring Township to zone the Transferred Area to comply with the requirements and restrictions set forth in the agreement. This is an illegal contract under Michigan law. The Townships' appeal should be denied.

6. The Act 425 Agreement Imposes Unambiguous and Illegal Zoning Requirements on Haring Township, and There Is No Mention of a "3-Phase Scheme."

In response to TeriDee's arguments below, the Townships were eventually forced to acknowledge, in their last round of briefing, that the Act 425 Agreement does impose zoning obligations on Haring Township. They argue, however, that these obligations are only "temporary" because they are purportedly part of a "3-phase scheme." Of course, the agreement does not contain or even reference any such "scheme." That is because the Townships invented this scheme at the tail-end of the lawsuit. The Townships' argument is not at all supported by the unambiguous language of the Act 425 Agreement, which does not describe any type of "three-phase approach." This argument also ignores the other requirements in the agreement that explicitly provide that Haring Township's zoning ordinance will always be subject to the regulations in the Act 425 Agreement. The Townships' argument also makes no sense and is contrary to the cannons of contractual interpretation.

First, there is nothing in the Act 425 Agreement that states or even suggests that Haring Township's zoning obligations with respect to the Transferred Area are temporary or go away once Haring Township initially complies with them, as the Townships now argue. Rather, the Act 425 Agreement provides, in a straightforward manner, that (1) Haring Township must amend its zoning ordinances consistent with the requirements of the agreement, (2) the residential portions of the Transferred Area "shall" be zoned in a particular manner, (3) the undeveloped portions of the Transferred Area "shall" be zoned in a particular manner, (4) Haring Township "shall not" consider a PUD rezoning application that does not meet the "minimum requirements" of the Act 425 Agreement, and (5) the "more stringent" zoning regulations in the Act 425 Agreement "shall apply" over any less stringent zoning regulations in Haring Township's zoning ordinances. Act 425 Agreement at 7–8, art I § 6(a)(1)–(2), Appellants' COA Brief at Ex 1. There is nothing in the agreement that suggests that any of these requirements are temporary or will be imposed in "stages."

While the Townships finally acknowledge that these requirements exist, they argue that they can be immediately undone based solely on the general language in the agreement that states that the "Transferred Area shall be subject to Haring's Zoning Ordinance and Building Codes as then in effect or subsequently amended." *Id*. at 18, art I § 6(c). However, while future Haring Township boards can obviously amend the zoning of the Transferred Area, such amendments must always meet the minimum requirements and restrictions of the Act 425 Agreement. As set forth above, there is simply no basis to interpret this general provision as overriding pages and pages of specific and detailed requirements and obligations in the Agreement.

Second, the Townships' new argument makes no sense. The Townships are actually urging that this Court interpret and construct the Act 425 Agreement such that Haring Township does have zoning obligations and requirements, but those obligations and requirements go away immediately and forever as soon as Haring Township rezones the Transferred Area. In other words, the Townships maintain that it is perfectly acceptable for Haring Township to undo the zoning requirements of the agreement immediately after they are carried out. This proffered interpretation is completely nonsensical. If the Townships truly wanted to give Haring Township unfettered zoning discretion with respect to the Transferred Area, they would have done so and said so in their agreement. There would have been no need for the Townships to provide, as they now claim they did, for a meaningless multi-phase process, the end result of which is that Haring Township has the ability to zone the property however it wants. Likewise, there would have been no need to insert ten pages of detailed zoning regulations and requirements into the agreement that, under the Townships' new reading, are completely meaningless and irrelevant. No rational party would enter into such an agreement.

In addition, the Townships' argument is completely unsupported by the factual record. Contrary to the allegations in the Townships' Brief on Appeal, Haring Township Supervisor Bob Scarbrough did not testify at pages 37–38 of his deposition that the Act 425 Agreement creates a three-phase approach to zoning. Likewise, none of the other Township board members offered any testimony about a three-phase approach to zoning. This is an argument that the Townships' joint counsel thought up in the latter stages of the summary disposition briefing in the case below. Again, if the Townships' wanted the Transferred Area to be zoned as part of a "three-phase plan," they would have actually said so in the Act 425 Agreement, either as it was originally drafted or in one of the amendments. They did not do so.

Finally, the Townships' argument also defies the cannons of contractual interpretation, including the primary rule that unambiguous language must be enforced as written[8] and the related rules of construction that (1) contracts should be read as a whole and meaning given to all terms,[9] (2) an interpretation that would render any part of the contract nugatory should be avoided,[10] and (3) specific contractual provisions override more general ones.[11]

C. THE CIRCUIT COURT PROPERLY REFUSED TO CONSIDER EXTRINSIC EVIDENCE.

Neither of the parties argued below that the Act 425 Agreement was ambiguous. The Townships nevertheless repeatedly attempted to introduce extrinsic evidence in support of their position. The circuit court properly refused to consider that evidence, and its ruling was based on the unambiguous language of the Act 425 Agreement. The Court of Appeals correctly affirmed the circuit court's opinion:

> Contrary to defendants' argument, the parties' intent is not controlled by how they applied the agreement, by their testimony, or by extrinsic evidence, such as the concurring resolutions the townships passed. Rather, the parties' intent is determined "by examining the language of the contract according to its plan and ordinary meaning." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). "In doing so, we avoid an interpretation that would render any portion of the contract nugatory." *Id*. A court's "primary task" in interpreting a contract is to "give effect to the parties' intention at the time they entered into the contract." . . . "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." (quoting *Hastings Mut Ins Co v Safety King, Inc,* 286 Mich App 287, 294; 778 NW2d 275 (2009).

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[8] *Wausau Underwriters Ins Co v Ajax Paving Indus Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003).

[9] *Royal Prop Group*, 267 Mich App at 719.

[10] *Knight Enters*, 482 Mich at 1006.

[11] *Holmes*, 281 Mich App at 596.

See Ex. A at 3. However, even if the circuit court or Court of Appeals had considered extrinsic evidence, the result would have been the same. The extrinsic evidence in the case, particularly the Townships' own characterization of their agreement before they realized that it contained illegal provisions, overwhelmingly favors TeriDee.

1. The Townships' Proffered Extrinsic Evidence Is Irrelevant.

As set forth above, the Townships' primary reaction to the circuit court's December 13, 2013, Opinion and Order with respect to the first round of summary disposition was to produce new extrinsic evidence in an attempt to bolster their interpretation of the Act 425 Agreement. These efforts were wasted. There is no basis for the Court to consider extrinsic evidence in this case, as the contractual provisions at issue are unambiguous.

Under Michigan law, "The main goal of contract interpretation generally is to enforce the parties' intent." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). "But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used." *Id.* Indeed, "the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms." *Zurish Ins Co v CCR & Co*, 226 Mich App 599, 604; 576 NW2d 392 (1997). Thus, "[c]lear, unambiguous, and definite contract language must be enforced as written and courts may not . . . consider extrinsic evidence to determine the parties' intent." *Wausau Underwriters Ins Co v Ajax Paving Indus Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003).

The Townships' self-serving statements about how the contract should be interpreted cannot be considered. The Townships have never even claimed that the agreement is ambiguous, and the remaining issues in this case have nothing to do with interpreting the Act 425 Agreement. The Act 425 Agreement unambiguously requires Haring Township to take certain zoning actions with respect to the Transferred Area, and these obligations bind both the current

and future boards. The Townships' introduction of eleventh-hour extrinsic evidence in the form of matching resolutions that they drafted during the course of the lawsuit adds nothing to this analysis and cannot be considered as a matter of law.

2. The Extrinsic Evidence in the Case Overwhelmingly Favors TeriDee.

Even assuming, for purposes of argument, that there is some ambiguity with respect to the illegal provisions in the Act 425 Agreement, the extrinsic evidence that the Townships created during this lawsuit is easily overcome by the other more compelling extrinsic evidence now on the record. First, notwithstanding that they signed resolutions to the contrary, several of the board members testified during their depositions that the zoning requirements in the Act 425 Agreement are binding on Haring Township. Soule Dep Tr 56:16–23, Appellants' COA Brief at Ex. 30; Baldwin Dep Tr 13:21–14:20, 15:20–24, 17:2–12, Appellants' COA Brief at Ex. 27; McCain Dep Tr 7:19–25, 8:15–20, 9:17–23, 10:8–19, Appellants' COA Brief at Ex. 29. Moreover, contemporaneous correspondence from Attorney Ronald Redick, who drafted the Act 425 Agreement for his clients Haring Township and Clam Lake, makes clear that he believes that the zoning and development provisions in the agreement are binding on Haring Township.

For example, on April 26, 2013, Mr. Redick wrote to the Townships' supervisors regarding his progress in drafting the Townships' agreement. See 4/26/13 e-mail from R. Redick to D. Rosser and B. Scarbrough, **Ex K**. In his e-mail Mr. Redick notes that he is working on finalizing the proposed agreement, "with the principle eye toward improving the zoning provisions to ensure that the development is of the nature and quality the Townships would want and accept." *Id.* If, as the Townships now maintain, the zoning provisions in the agreement are not at all binding on Haring Township, Mr. Redick would have no concern about drafting language that the Townships would "want and accept." Later that same day, Mr. Redick again wrote to the Townships' supervisors with a revised draft of the Act 425 Agreement. Mr. Redick

notes in his correspondence that the principle change in the agreement is the addition of "detailed mixed-use PUD regulations" to Article 1, paragraph 6 of the agreement. 4/26/13 e-mail from R. Redick to D. Rosser and B. Scarbrough, **Ex L**. Significantly, Mr. Redick specifically notes that the regulations set forth in the Act 425 Agreement "would need to be incorporated into the Haring zoning ordinance, within one year after the effective date of the agreement." Thus, the Townships' agent, who drafted the agreement at their request, makes clear that Haring Township is required to incorporate the "detailed mixed-use PUD regulations" into its zoning ordinance. *Id.*

Finally, Mr. Redick further confirmed that the zoning and development provisions of the agreement are binding on Haring Township in his May 9, 2013, correspondence to counsel for TeriDee. See 5/9/13 letter from R. Redick to R. Kraker, **Ex M**. In his letter, Mr. Redick first conveyed the fact that the Townships were unwilling to delay the implementation of the agreement. *Id*. at 1. Mr. Redick further acknowledged that the zoning regulations in the Act 425 Agreement were likely unacceptable to TeriDee, but confirmed that the regulations in the agreement were binding on Haring Township and could only be modified by way of the Townships renegotiating and amending the agreement:

> It is true that the first draft of the proposed zoning regulations might not address your client's concerns, because the Act 425 Agreement **constrains** Haring Township with respect to some of the minimum PUD requirements. However, as I explained at the joint public hearing, the two Townships have expressly agreed to renegotiate the Act 425 Agreement in good faith, to amend the part of the revenue stream generated from utilities. As part of that renegotiation process, if it is determined that such modifications would be appropriate to allow reasonable the Townships could certainly also entertain amendments to the specified zoning regulations commercial development, while still being adequately protective of surrounding residential populations.

Id. at 2 (emphasis added).

Thus, Mr. Redick makes clear, again, that Haring Township is most certainly bound by the zoning regulations set forth in the Act 425 Agreement and that the agreement would need to be amended to loosen the requirements. To the extent the Court identifies an ambiguity and is inclined to consider extrinsic evidence, the statements and opinions of the individual who drafted the agreement for both parties to the agreement is much more compelling than the matching resolutions that the Townships passed during this lawsuit below in direct response to the circuit court's first opinion.

3. The Townships' Conduct in Carrying Out Their Agreement, Which Is Merely Another Form of Extrinsic Evidence, Cannot Save Their Illegal Contract.

The Townships also argue that their conduct in carrying out the Act 425 Agreement demonstrates that Haring Township's legislative authority has not been constrained. This argument cannot save the illegal agreement. First, evidence of the Townships' conduct in carrying out the agreement is simply another form of extrinsic evidence[12] that is irrelevant to the Court's analysis, as there is no ambiguity to resolve. Moreover, as argued above, the fact that Haring Township modified its zoning ordinances without the Townships also amending the Act 425 Agreement does nothing to establish that Haring Township's legislative authority is not unlawfully constrained. Again, the Act 425 Agreement specifically provides that, with respect to the development of the Transferred Area, the more restrictive requirements in the agreement will trump any less restrictive ordinances that Haring Township might enact. See Act 425 Agreement at art 1 § 6(a)(V), p 17, Appellants' Appeal Br Ex 1. Thus, Haring Township's enactment of a PUD zoning ordinance that contained minor variations from the requirements of the Act 425

[12] See, e.g., *Klapp v United Ins Group Agency Inc,* 468 Mich 459, 469; 663 NW2d 447 (2003)(the parties' conduct is a form of extrinsic evidence).

Agreement was nothing more than a thinly veiled, and ultimately meaningless, attempt to manufacture a defense in this case.

Second, the Townships provide no authority for their proposition that they can, in essence, accomplish a "*de facto*" severing of the illegal provisions by voluntarily refraining from enforcing those rights and obligations. No such authority exists, and the Townships' argument is nonsensical. This case concerns the future constraint of Haring Township's legislative authority, and the fact that the Townships are not currently enforcing or following the illegal provisions does nothing to prevent them, or their future boards, from doing so. In other words, adopting the Townships' position would leave them free to constrain Haring Township's zoning power and authority one month, one year, or ten years from now.

Finally, without regard to whether the Townships are complying with the illegal zoning provisions, Michigan courts have a duty to "refuse to enforce a contract that is contrary to public policy." *Sands Appliance Serv Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). Indeed, "[w]hether a promise is unenforceable on grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law." 1 Restatement Contracts, 2d, § 179, Comment (d), p 18. As a result, it would not matter if the Townships did agree to ignore the zoning requirements in the Act 425 Agreement. Because the Act 425 Agreement violates public policy by contracting away Haring Township's legislative authority, it cannot be enforced and must be declared void as a matter of law.

D. THERE IS NO AUTHORITY IN ACT 425 OR IN ANY OTHER MICHIGAN STATUTE THAT PERMITS ONE TOWNSHIP TO CONTRACT AWAY ITS LEGISLATIVE ZONING POWER TO ANOTHER TOWNSHIP.

In their Brief on Appeal, the Townships claim that Act 425 allows one township to contract away its legislative zoning powers to another, based on an interpretation of a provision

of Act 425 that the Townships have invented out of whole cloth. The Townships also argue that every Act 425 agreement necessarily binds future municipal boards in the exercise of their legislative power, such that there is "implicit" authority in the statute for such a scheme. These arguments, which unquestionably ask the Court to make new law, can be easily cast aside, as the Court of Appeals concluded when it held that "§ 6 of Act 425 does not allow for contract zoning." See Ex. A at 7.

Not only is the Townships' argument completely unsupported by any case law or statutory authority, it is expressly contrary to recently published Michigan decisions and the single source of township zoning authority: the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3101, *et seq*. Because all township zoning authority comes from the MZEA and because, as the circuit court correctly held,[13] the MZEA does not expressly authorize the zoning requirements that are imposed on Haring Township in the Townships' Act 425 Agreement, Act 425 cannot provide for such zoning authority as a matter of law.

Moreover, as a practical matter, there is no reason that an Act 425 agreement should or would need to bind a township in the exercise of its zoning authority. While a proper Act 425 agreement will identify a specific economic development project, the details of how the transferred area is to be zoned and regulated are properly and necessarily left to the transferee municipality. This case presents the exact opposite situation, where the Act 425 Agreement dictates every precise detail related to the zoning of any potential development, down to the minimum percentage of glass in front building facades (15 percent), the number of trees in the landscaped areas (one every 30 feet, of at least 8 feet in height), and the color of the building materials (*i.e.*, "subtle colors shall be used for roofing"). This is an improper delegation of

[13] See 12/20/13 Op & Order at 10, Appellants' Appeal Br Ex 18.

Haring Township's legislative zoning authority, which renders the Act 425 Agreement void as a matter of law.

1. Act 425 Does Not Authorize the Illegal Zoning Requirements that Are Imposed on Haring Township in the Act 425 Agreement.

As set forth above, the Townships ask the Court to make new law and hold that Act 425 allows for contract zoning, even though the word "zoning" does not even appear in the statute and contract zoning is only allowed in two specific instances under a separate statute. The Court should decline this invitation, as both the Court of Appeals and the circuit court properly did below:

> The Act 425 agreement before this Court dictates that a certain Planned Unit Development (PUD) zoning provision be enacted by Haring Township and be made applicable to the subject property. The townships argument that Act 425 allows such a zoning provision or that it is allowed by MZEA is unavailing.

12/20/13 Op at 10, Appellants' COA Brief at Ex. 18 (emphasis added).

Townships have no inherent powers or police power of their own, but have only those powers expressly granted to them by the legislature or the Michigan Constitution. Const 1963, Art 7, § 17; *Brandon Twp v North-Oakland Residential Servs Inc*, 110 Mich App 300, 304; 312 NW2d 238 (1981). With respect to zoning, "Municipalities derive their authority to zone solely pursuant to state enabling legislation." *Lake Twp v Sytsma*, 21 Mich App 210, 212; 175 NW2d 337 (1970); see also *Whitman v Galien Twp*, 288 Mich App 672, 679; 808 NW2d 9 (2010)(recognizing that "a local unit of government must be specifically authorized by the Legislature to exercise any zoning authority").

The MZEA is the enabling statute that vests the township with the authority to regulate land development and use. *Addison Twp v Gout*, 435 Mich 809, 813; 460 NW2d 215 (1990); *Lubienski v Scio Twp*, unpublished opinion per curiam of the Court of Appeals dated March 23, 2010 (Docket Nos 288727, 288769), at *3. The Townships do not even attempt to argue that the

MZEA allows for contract zoning between two municipalities. Likewise, they cannot point to any Michigan statute that expressly provides them with such a right, and they do not dispute the fact that the Court of Appeals has expressly held that such contracts are illegal. See *Inverness*, 263 Mich App at 241. Nevertheless, the Townships ask this Court to adopt their strained interpretation of a provision in Act 425 that does not even contain the word "zoning."

The provision in question is found in MCL 124.26(b) and provides that an Act 425 agreement may provide for "the adoption of ordinances and their enforcement by or with the assistance of the participating local units." According to the Townships, this Court should rule that the quoted language means that two Townships can engage in contract zoning, under which one Township can delegate its legislative zoning powers to another. This argument cannot survive a plain language analysis. This text simply does not support the Townships' invented interpretation that an Act 425 agreement can override Michigan law and dictate that the transferee municipality is required to enact a specific zoning ordinance. To the extent further guidance is needed, Act 425 itself provides the explanation.

Act 425 allows a municipality to transfer some or all of its jurisdiction and municipal functions over the conditionally transferred property. See MCL 124.28. If, for example, one municipality transfers its jurisdiction to enforce building codes to another municipality that has not yet enacted building codes, that municipality would need to adopt new ordinances, and the parties can agree in their contract that the transferee municipality will do so. The parties cannot agree that the transferee's current and future boards will enact and enforce a particular, defined set of building code requirements, as that would be an unlawful delegation of the transferee municipality's legislative authority. The same analysis applies to zoning ordinances. An Act 425 agreement can provide, generally, that a transferee municipality will adopt and enforce

zoning ordinances with respect to the transferred property. The statute does not say that the transferor can require the transferee to be bound by a particular type of zoning or set of requirements.

Moreover, the canons of statutory interpretation do not support the Townships' position. The Townships are wrong to baldly claim that Act 425 "relates to the same subject matter" or "shares a common purpose" with the two contract zoning exceptions in the MZEA. In fact, the provisions relate to different subject matters (contracts between developers and municipalities versus contracts between municipalities) and therefore were not enacted to serve the same purpose. It would be a violation of basic statutory construction to read Act 425 and the MZEA as a "unified whole."

In short, there is no provision in Act 425 or in any other Michigan statute that authorizes the contractual zoning requirements that are contained in the Townships' Act 425 Agreement.

2. Act 425 Does Not "Implicitly" Allow for Contract Zoning Between Two Municipalities.

If the legislature intended to allow for contract zoning between two municipalities in the context of an Act 425 agreement, (1) it would have actually said so and (2) it would have said so in the MZEA, where such zoning enabling legislation is contained and belongs. The fact that there is no such authority in the MZEA is the beginning and the end of this analysis. This is why, in its December 20, 2013, Opinion and Order, the circuit court specifically rejected the Townships' argument that either the MZEA or Act 425 allows two municipalities to engage in contract zoning. 12/20/13 Op at 10, Appellants' COA Brief at Ex 18. There simply is no authority, either express or implied, in any case law or statute that would allow one township to bind another in the exercise of its zoning authority.

As set forth above, municipalities derive their authority to zone solely pursuant to the MZEA. Within the MZEA there are two specific, limited circumstances under which the legislature has authorized municipalities to engage in contract zoning. See MCL 125.3405; MCL 125.3503; MCL 125.3504. These provisions set forth comprehensive rules, restrictions, and procedures for the limited contract zoning that is allowed. Moreover, in both of those instances, municipalities are authorized to contract with developers, not other municipalities. Again, there is no statute in Michigan that allows two townships to enter into an agreement that contracts away one of the township's current and future boards' legislative powers to zone property. To the contrary, the Court of Appeals has expressly held that such contracts are illegal and void. See *Inverness*, 263 Mich App at 241.[14]

In sum, the fact that there is no express authority in the MZEA that would allow two municipalities to engage in contract zoning (in an Act 425 agreement or otherwise), coupled with the fact that the Court of Appeals has expressly ruled that such contracts are illegal, conclusively settles the issue of whether Act 425 could even hypothetically allow for such a practice, if only by implication. Act 425 cannot, by implication, create or expand zoning rights or authority that are not expressly set forth in the MZEA, and it cannot create implied rights that are contrary to Michigan law.

[14] It is noteworthy that the Court's holding in *Inverness*, that the consent judgment at issue was void as an improper infringement of the legislative authority of future township boards, was based in part on concerns of disenfranchising township voters. *Inverness*, 263 Mich App at 247. The Townships' Act 425 Agreement implicates the same concerns. The MZEA sets forth certain notice and hearing requirements in connection with enacting or amending a zoning ordinance. By obligating future Haring Township boards to zone the Transferred Area in certain ways, the Act 425 Agreement removes all significance and meaning from the required public notice and hearings by mandating a pre-ordained result.

3. A Proper Act 425 Agreement Need Not and Should Not Require the Transferee Municipality to Contract Away Its Zoning Authority.

Aside from the plain legal error in their position, the Townships' factual argument that every Act 425 agreement necessarily imposes specific zoning restrictions on the transferee municipality is just not true. To the contrary, in the context of a legitimate Act 425 agreement, a transferee municipality would be free to zone and rezone the transferred property using any number of zoning schemes, limited only by its own creativity and ingenuity in designing its zoning ordinances consistent with the requirements of the MZEA in order to accomplish an agreed upon economic development project.

For example, the parties to an Act 425 agreement could specify that the transferred area is planned for a commercial economic development project or a more specific commercial use, such as, for example, a Meijer store. However, the detail of how the transferred area is to be zoned to accomplish that development project or use must be left to the transferee community according to the dictates of the MZEA. The specific zoning detail to accomplish the development, as well as the myriad of details applicable to that particular zone, are the purview of the transferee municipality and cannot be delegated or contracted away under Michigan law.

Alternatively, the transferee municipality could elect to make no zoning changes whatsoever and allow the transferred property to be developed through a use variance to the existing zoning plan. Likewise, an Act 425 agreement that only (and that actually) provides for the provision of water and sewer services may not contemplate any change in zoning, as there would be no need to rezone the transferred area simply to provide water and sewer services to the property. Thus, an Act 425 agreement does not necessarily implicate any change in zoning at all, let alone a specific change that is binding on future township boards.

E. THE TOWNSHIPS CANNOT SEVER AND REMOVE THE ILLEGAL ZONING PROVISIONS FROM THEIR CONTRACT.

There is no factual dispute that the unambiguous language of the Act 425 Agreement divests Haring Township of its legislative power and discretion with respect to the zoning and rezoning of the Transferred Area. This is a violation of Michigan law. Faced with this reality, the Townships argue that they can save their illegal agreement by severing and removing the offending provisions. The Townships' position, however, is contrary to Michigan law, which is why the Court of Appeals affirmed the lower court's holding on appeal. See Ex. A at 5.

1. Because the Illegal Zoning Provisions Are Central to the Act 425 Agreement and Interdependent with the Remainder of the Agreement, They Cannot Be Severed from the Agreement as a Matter of Law.

In order for an illegal provision in a contract to be severable, "the illegal provision must not be central to the parties' agreement." *AFSCME v Detroit*, 267 Mich App 255, 272–73; 704 NW2d 712 (2005)(citing *Stokes v Millen Roofing Co*, 466 Mich 660, 666; 649 NW2d 371 (2002)). Moreover, even where "the parties may have intended that specific terms of [an] agreement be severable under [a] severability provision," courts will not sever a provision that is interdependent with the remainder of the agreement. *Tecorp Entm't Ltd v Heartbreakers Inc*, unpublished opinion per curiam of the Court of Appeals dated February 9, 2001 (Docket No 209861), at *4 (holding entire agreement invalid where provision that violated public policy could not be severed despite severability clause).

First, the zoning requirements cannot be severed because the Act 425 Agreement would no longer contain even an arguable economic development project. All that would remain under the severability provision is the bald requirement that Haring Township follow the law, which would fall far short of satisfying the requirements of an economic development project under Act 425. For this reason, there can be no question that the illegal zoning provisions are central to the

Act 425 Agreement and that the remainder of the agreement is interdependent upon those provisions. As the circuit court correctly held, "to sever the provisions with respect to zoning requirements is fatal to the agreements compliance with the requirements of Act 425." 9/19/14 Op at 15, Appellants' COA Brief at Ex. 48.

Second, the zoning restrictions and requirements cannot be severed from the agreement because there would be no material benefits or obligations left to enforce or enjoy. Even with those requirements in place, the Township board members were hard-pressed to identify any benefit to Clam Lake under the agreement:

> Q. As we sit here today, what benefit is Clam Lake getting under this Act 425 Agreement?
> A. The benefit that they would get from this Act 425, that in the end of the time period, it reverts back to Clam Lake.
> Q. What else? What other benefits is Clam Lake currently receiving under this agreement?
> A. They would receive— if the transferred area, if Haring Township did provide water and sewer, then they would benefit that we could then provide other areas in the township. And that would be the key issue.
> Q. There is the possibility to explore that; correct?
> A. Correct.
> Q. Any other benefits that you are aware of or can think of that Clam Lake is currently getting under this agreement?
> A. No.

Soule Dep Tr 20:17–21:6, Appellants' COA Brief at Ex. 30 (emphasis added).

> Q. And that's the benefit that Clam Lake gets out of this agreement, the property has been transferred and is subject to minimum zoning requirements. Correct?
> A. Yes.
> Q. What other benefits does Clam Lake get out of this agreement?
> A. Well, the agreement lasts for 20 years I am thinking and after the 20-year period is up then the land can be reverted back to Clam Lake Township.
> Q. Anything else, any other benefits to Clam Lake under this agreement, that you are aware of?
>
> * * *
>
> A. I don't have an answer.
> Q. You are not aware of any others--
> A. No.

Peterson Dep Tr 10:13–23, 11:3–6, Appellants' COA Brief at Ex. 21 (emphasis added).

> Q. As we sit here today, what benefits is Clam Lake receiving under the Act 425 Agreement?
> A. The good feeling that Haring will make the right decisions in terms of their zoning regulations.
> Q. What else?
> A. That's pretty much it.
>
> * * *
>
> Q. Clam Lake didn't enter into that agreement for the purpose of getting water and sewer services to Clam Lake from Haring. Correct?
> A. 425's intent was to have Haring take over that property for 20 years and to establish the zoning regulations for that property or those areas.

Payne Dep Tr 19:19–24, 22:10–18, Appellants' COA Brief at Ex. 20 (emphasis added); see also Scarbrough Dep Tr 28:12–17, Appellants' COA Brief at Ex. 31. Moreover, the e-mails that the Townships produced in response to TeriDee's discovery requests and the board members' deposition testimony make clear that the restrictive zoning provisions in the Act 425 Agreement were the central provision and reason that the agreement was executed.

Consistent with the fact that there are no other material benefits or obligations in the Act 425 Agreement, the Township supervisors uniformly testified that the agreement does not require Haring Township to provide water or sewer utilities to Clam Lake. Mackey Dep Tr 21:1–3, Appellants' COA Brief at Ex. 23; McCain Dep Tr 13:5–15, Appellants' COA Brief at Ex. 29; Kitler Dep Tr 25:12–17, Appellants' COA Brief at Ex. 24; Soule Dep Tr 20:14–16, Appellants' COA Brief at Ex. 30; Baldwin Dep Tr 18:24–19:1, Appellants' COA Brief at Ex. 27. Likewise, to the extent there is any "requirement" in the Act 425 Agreement that Haring Township provide water and sewer to the Transferred Area, discovery has confirmed that any such requirement is illusory and subject to several conditions that will never come to pass, including the development of the Transferred Area pursuant to the restrictive zoning regulations in the Act 425 Agreement and the requirement that TeriDee pay for all of the costs to extend the utilities into the Transferred Area.

In addition to being central to the Agreement, the illegal provisions cannot be severed because they are interdependent with the remainder of the Agreement. In particular, the "requirement" that Haring Township provide water and sewer to the Transferred Area, as illusory as it already is, would become completely illusory as a matter of law if the development and zoning regulations are removed from the agreement and replaced with the single requirement that Haring Township comply with MCL 125.3504(3). This would be no requirement at all, as Haring Township is already obligated to comply with MCL 125.3504(3), regardless of whether the Act 425 Agreement says so.

Thus, if the Townships' new severability provision took effect, Haring Township would have absolutely no obligation to even have a PUD zoning ordinance in place and could zone the Transferred Area in such a way as to prohibit any commercial development. These facts are not in dispute. And because Haring Township would have the unfettered discretion to control whether the Transferred Area was ever developed, it would also have the unfettered discretion to control whether it would be obligated to provide water and sewer utilities to the Transferred Area, the only other arguable material requirement that the Act 425 Agreement currently imposes. This is the very definition of an illusory agreement under Michigan law. See, e.g., *Mastaw v Naiukow*, 105 Mich App 25, 29; 306 NW2d 378 (1991)(holding that settlement agreement was not a binding contract where one party had "unfettered discretion" to accept or reject the settlement); *Estate of Swartzenberg v Swartzenberg*, unpublished opinion per curiam of the Court of Appeals dated June 24, 1997 (Docket No 196677), at *4 (explaining that there is no mutuality of obligation where one party's promise provided him with the sole discretion to determine whether he was obligated to perform).

2. The Language in Article 1, Section 3 of the Act 425 Agreement Does Not Provide a Basis for Severing the Illegal Provisions.

For the first time on appeal, the Townships also argue that they should be able to sever the illegal provisions because the language in amended Article 1, Section 3 would still provide for a viable Act 425 agreement. This new argument does not change the analysis on severability in any way.

If all of the illegal provisions regarding the economic development project were removed and the Townships were left with only Article 1, Section 3, they would be left with nothing at all. They most certainly would not have a valid Act 425 agreement as a matter of law. The language in that single paragraph, which the Townships added during the course of the lawsuit below, does nothing more than describe, in the most general and generic of terms, the type of "proposed" economic development project that the Townships would (allegedly) like to see occur. In order for an agreement to be valid under Act 425, it must provide for an actual economic development that will be carried out by the parties. See MCL 124.22(1)(an Act 425 agreement is required to be "for the purpose of an economic development project").

As the Court of Appeals has held, an Act 425 agreement is only statutorily authorized if it is used to "establish" an economic development project. *Casco Twp v State Boundary Comm'n*, 243 Mich App 392; 622 NW2d 332 (2000). One of the parties to the agreement must transfer property to the other party for the specific purpose of implementing an economic development project. Article 1, Section 3 of the Act 425 Agreement does not do any of those things and does not impose any actual requirement or obligations on either party at all. For this reason, if the offending provisions were severed, leaving only Article 1, Section 3, the Agreement would not be valid under Act 425. *Id.* at 401–02. This is another reason why the illegal provisions cannot be severed.

Indeed, in their Brief on Appeal the Townships conceded that amended Article 1, Section 3 was nothing more than a "minor change" to the Act 425 Agreement that attempts to clarify the Townships' "original intent" that any economic development project should be designed and constructed in accordance with the recommendations of the *Corridor Study*. The Townships do not explain how Article 1, Section 3, standing alone, would impose development requirements or obligations on either party or otherwise ensure that a development project would ever occur. As set forth above, Article 1, Section 3 most certainly does not require the provision of sewer or water service to the Transferred Area. The full agreement, without any provisions removed, does not require that.

Thus, the Townships cannot be heard to argue that a contract that does not require an economic development project is somehow still valid under Act 425. The circuit court, in surveying what would remain in the contract (including amended Article 1, Section 3) after the offending provisions were removed, correctly held that the agreement would not comply with Act 425. 9/19/14 Op at 15, Appellants' COA Brief at Ex. 48. This provided further support for the court's ruling that the illegal zoning provisions cannot be severed from the Act 425 Agreement as a matter of law. That ruling was properly upheld on appeal, and there is no basis for this Court to reexamine or disturb that opinion.

V. RELIEF REQUESTED

For the reasons stated above, TeriDee LLC respectfully requests that this Court deny Appellants' Application for Leave to Appeal.

Respectfully submitted,

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Date: February 8, 2016

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PROOF OF SERVICE

I HEREBY CERTIFY THAT ON February 8, 2016, I electronically filed the foregoing paper with the Court using the TrueFiling which will send notification of such filing to counsel of record at their e-mail addresses on file with the Court.

/s/ Brion B. Doyle
Brion B. Doyle

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